

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TIMMY GLAZE

Claimant

V.

JK WILLIAMS LLC

Respondent

AND

COMMERCE & INDUSTRY INS. CO.

Insurance Carrier

Docket No. 1,063,419

ORDER

Claimant, by Daniel L. Smith, requests review of Administrative Law Judge Rebecca Sanders' February 12, 2016 Order. Christopher J. McCurdy appeared for respondent and insurance carrier (respondent).

RECORD AND STIPULATIONS

The record consists of motion hearing transcripts dated July 16, 2014 and February 3, 2016, in addition to all pleadings contained in the administrative file.

ISSUES

This case involves the judge's dismissal of a claim for an August 26, 2011 injury by accident after finding claimant did not proceed to a regular hearing, settlement hearing or an agreed award within three years of filing an application for hearing and did not file a motion for an extension of time within the three year period, as based on K.S.A. 2011 Supp. 44-523(f)(1).

Claimant argues the judge erroneously dismissed his case. Basically, claimant argues his not requesting an extension of time within the three year period should not automatically warrant dismissal. He argues there is no point in having a hearing to address respondent's motion to dismiss if all that is required for dismissal is claimant's failure to file a motion to extend before the three years passed. Claimant argues the judge must find that he both failed to prosecute his claim and did not have good cause for an extension of time, but the judge made neither finding. Further, claimant argues he need not file a motion for extension of time in the three year period.

Claimant argues his case should not be dismissed because there is good cause why his claim had not proceeded to regular hearing, settlement hearing or agreed award, mostly because he never reached maximum medical improvement (MMI) and any delay was largely due to respondent's "unwillingness to provide a realistic means for [him] to attend [medical] appointments" arranged by respondent because he lives out of state.¹

Claimant also argues K.S.A. 2011 Supp. 44-523(f)(1) violates the due process clause of the Kansas Constitution.

Respondent maintains the Order should be affirmed. Respondent argues claimant failed to file the required motion for extension of time within the three year period, and his case was rightfully dismissed.

The issue is: was dismissal pursuant to K.S.A. 2011 Supp. 44-523(f) appropriate?

FINDINGS OF FACT

Claimant sustained injury by accident on August 26, 2011. He alleged injuries to his left leg, left arm and back, with reflex sympathetic dystrophy affecting his whole body. Claimant filed his application for hearing on December 5, 2012.

On September 17, 2013, a prehearing settlement conference was held. The parties stipulated the claim was compensable; the main issue was nature and extent of disability. A dispute arose between the parties concerning transportation from claimant's home in Alabama to Kansas for evaluations by respondent's experts.

On May 14, 2014, respondent filed a motion to compel claimant's attendance for the aforementioned evaluations. The motion was heard July 16, 2014. The judge ordered respondent to fly claimant from Alabama to Kansas City, provide specialized transportation in Kansas City and reasonable per diem and lodging. Claimant was ordered to cooperate in scheduling the appointments and travel. Respondent arranged for claimant to travel to Kansas City in August 2014 for evaluations with a medical doctor and a psychologist.

On August 4, 2015, the judge placed the claim on inactive status.

On January 4, 2016, respondent filed an application for dismissal. On January 29, 2016, claimant filed a motion for extension pursuant to K.S.A. 2011 Supp. 44-523(f) and attached medical documentation that he was not at MMI and needed treatment for chronic pain syndrome, narcotic habituation and his psychological condition. Claimant also noted difficulties communicating with co-counsel in Alabama and obtaining an opinion from a psychologist regarding the prevailing factor requirement.

¹ Claimant's Brief at 9.

On February 3, 2016, the hearing on respondent's application was held. On February 12, 2016, the judge dismissed the claim because, "the three year limitation ended on December 5, 2015" and "Claimant did not file a motion to extend time to proceed to regular hearing until January 29, 2016."²

Claimant timely appealed.

PRINCIPLES OF LAW

Kansas workers compensation appellate cases emphasize literally interpreting and applying plainly-worded workers compensation statutes.³ The text of a statute should not be supplanted by information outside the plain wording of a statute.⁴ *Hoesli*⁵ states:

When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007). We determine legislative intent by first applying the meaning of the statute's text to the specific situation in controversy. See *State v. Phillips*, 299 Kan. 479, 495, 325 P.3d 1095 (2014) (first task in construing statute is to ascertain legislative intent through analysis of language employed, giving ordinary words their ordinary meanings). A court does not read into the statute words not readily found there. *Whaley*, 301 Kan. at 196, 343 P.3d 63; *Graham*, 284 Kan. at 554, 161 P.3d 695; see *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 525, 154 P.3d 494 (2007). When the language is unclear or ambiguous, the court employs the canons of statutory construction, consults legislative history, or considers other background information to ascertain the statute's meaning. *Whaley*, 301 Kan. at 196, 343 P.3d 63.

K.S.A. 2011 Supp. 523(f)(1) states:

In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award under the workers compensation act within three years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for

² ALJ Order on Motion to Dismiss at 3.

³ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009); see also *Fernandez v. McDonald's*, 296 Kan. 472, 478, 292 P.3d 311 (2013); *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 618, 256 P.3d 828 (2011); *Hall v. Knoll Bldg. Maint., Inc.*, 48 Kan. App. 2d 145, 152, 285 P.3d 383 (2012); *Messner v. Cont'l Plastic Containers*, 48 Kan. App. 2d 731, 741-42, 298 P.3d 371 (2013), *rev. denied* (Aug. 30, 2013); and *Tyler v. Goodyear Tire and Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

⁴ See *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 560-61, 293 P.3d 723 (2013).

⁵ *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 361 P.3d 504, 508-09 (2015).

hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the three year limitation provided for herein. If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge for lack of prosecution. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

ANALYSIS

In *Hackler*,⁶ *Hoffman*⁷ and *Ramstad*,⁸ the Board stated a claimant's motion to extend the three year period upon a showing of good cause must be made before the three year period expires. Because no such motions were either not timely filed or not filed at all, the Board affirmed dismissals of those claims. In *Riedmiller*,⁹ the Board reversed a dismissal under K.S.A. 2011 Supp. 44-523(f) where the claimant: (1) requested an extension of time before the three year period expired and (2) she was prosecuting her claim.

This claim is akin to *Hackler*, *Hoffman* and *Ramstad*. Under the literal text of K.S.A. 2011 Supp. 44-523(f), a motion to extend must be filed within the three years after an application for hearing is filed and claimant must prove good cause to warrant an extension. The first sentence of the statute equates a lack of prosecution with a claimant taking more than three years after the filing of an application for hearing to get to a regular hearing, settlement hearing or award.

The Board is not permitted to determine whether K.S.A. 2011 Supp. 44-523(f) violates claimant's due process rights. Moreover, for reasons set forth in *Hackler*, the Board respectfully disagrees with the dissent.

CONCLUSION

Having carefully reviewed the entire evidentiary file contained herein, the Board affirms the judge's dismissal under K.S.A. 2011 Supp. 44-523(f).

⁶ *Hackler v. Peninsula Gaming Partners, LLC*, No. 1,060,759, 2016 WL 858312 (Kan. WCAB Feb. 25, 2016), *pet. for rev. filed* Mar. 22, 2016.

⁷ *Hoffman v. Dental Central, P.A.*, No. 1,058,645, 2015 WL 4071473 (Kan. WCAB June 26, 2015).

⁸ *Ramstad v. U.S.D.* 229, No. 1,059,881, 2015 WL 5462026 (Kan. WCAB Aug. 31, 2015).

⁹ *Riedmiller v. Del Monte Foods Co.*, No. 1,061,483, 2015 WL 9672643 (Kan. WCAB Dec. 14, 2015).

ORDER

WHEREFORE, the Board affirms the February 12, 2016 Order.

IT IS SO ORDERED.

Dated this _____ day of April, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents for the reasons set forth in *Hackler*. For a dismissal to be based on a lack of prosecution, there must be a lack of prosecution and the statute, as a condition of dismissal, requires a specific finding claimant failed to establish good cause. Claimant has prosecuted his case without a lack of prosecution and the judge made no finding that claimant lacked good cause for an extension. Therefore, dismissal was improper.

The Board may not comment on the constitutionality of K.S.A. 2011 Supp. 44-523(f) and such issue requires appellate guidance.

BOARD MEMBER

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